UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, *et al.*, Plaintiffs, v. ENRON CORPORATION, *et al.*, Defendants.	§	Civil Action No. H-01-3624
PIRELLI ARMSTRONG TIRE CORPORATION RETIREE MEDICAL BENEFITS TRUST, Derivatively On Behalf of Enron Corp., *et al.*, Plaintiffs, v. KENNETH L. LAY, *et al.*, Defendants.	§	Civil Action No. H-01-3645
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, Plaintiffs, v. ENRON CORPORATION, *et al.*, Defendants.	§	Civil Action No. H-01-3913

TITTLE PLAINTIFFS' OPPOSITION TO DEFENDANT ANDREW S. FASTOW'S MOTION TO POSTPONE DISCOVERY DURING PENDENCY OF CRIMINAL PROCEEDINGS

I.

INTRODUCTION

As the Court is well aware, and as Defendant Andrew S. Fastow ("Fastow") concedes in his Motion to Postpone Discovery During Pendency of Criminal Proceedings, Fastow was at the very heart of the Enron meltdown. *See, e.g.*, Fastow Mem. at 3 (cases allege "Fastow and others used various partnerships, including LJM-Cayman, LJM-2, Raptor, and Southampton as part of a fraudulent scheme to deceive Plaintiffs and to enrich themselves"). Indeed, Fastow burst upon the public scene in December 2001, when he became the first of a series of Enron and Andersen defendants to invoke the Fifth Amendment privilege against self-incrimination and refused to testify before Congress and in depositions in this case. Importantly, the invocation of the Fifth Amendment can and will be used against these defendants in the pending *Tittle* civil litigation.[1]

Now, unique among the many defendants who face potential criminal charges for their role in the Enron conspiracy, Fastow seeks to stay discovery (and trial) against him until any criminal proceedings against him come to an end. Fastow's sole basis for seeking a stay is to avoid what he calls the "Hobson's choice" of either responding to civil discovery or invoking the Fifth Amendment. Fastow ignores two crucial points: ***first,*** he has ***already*** made the choice, and invoked the Fifth Amendment. Any further harm to Fastow that may result should he continue to invoke the Fifth Amendment here is incremental at best. Second, the United States Supreme Court has explicitly held that the choice faced by Fastow is one he can (and should) be required to make, since ***the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.***

Moreover, the law is clear that Fastow can be compelled to produce responsive documents in his possession or control notwithstanding the Fifth Amendment, since he was not

[1] *See, e.g., Baxter v. Palmigiano,* 425 U.S. 308, 318-19 (1976) (Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.); *see also Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 675 (5th Cir. 1999) (holding that "The district court . . . abused its discretion in excluding the evidence of [defendant's] invocation of his Fifth Amendment privilege.")

compelled to create the documents within the meaning of the Constitution. *See, e.g., United States v. Hubbell*, 530 U.S. 27, 35-36 (2000). Hence, there can be no argument that the Fifth Amendment automatically protects Fastow from responding to document requests. Equally misplaced is Fastow's argument that the prosecution in his future criminal case might unfairly benefit if Fastow is compelled to respond to broader civil discovery requests. The rule Fastow cites only applies to defendants who have already been indicted, for the limited criminal procedure rules only apply to them. In contrast, the Grand Jury investigating Fastow has broad subpoena rights, and can likely obtain whatever documents Fastow has in his possession or control to as great an extent as the *Tittle* Plaintiffs.

Finally, should it grant Fastow the remedy he seeks, the Court will no doubt face a torrent of copycat motions by other defendants, such as the many Andersen partners (many of whom have taken the Fifth Amendment either before Congress or at depositions in this case, and all of whom face a criminal trial), Kenneth Lay, (who invoked the Fifth Amendment before Congress) and David Duncan. Indeed, based on media reports, public documents and the Plaintiffs' allegations, many of the defendants could potentially face criminal liability. Yet while such an indefinite postponement of Plaintiffs' case would provide little refuge for these defendants – many of whose Fifth Amendment choices are already a matter of public record – it would be disastrous to the Plaintiffs. Given the strong interest of the Plaintiff-employees in the prompt resolution of this case, and the strong public interest in the expeditious resolution of these proceedings, this Court should deny Fastow's motion and allow this case to proceed.

II.

ARGUMENT AND AUTHORITIES

As the Fifth Circuit has made clear, "[t]here is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions." *SEC v. First Financial Group, Inc.*, 659 F.2d 660, 666-67 (5th Cir. 1981). While this Court would

have the discretion to enter a stay if the interests of justice so-demanded, all of the relevant factors counsel strongly against the grant of a stay to Fastow here.

A. There Is No Constitutional Bar to Requiring Fastow to Respond to Discovery Here

The United States Supreme Court, and the Fifth Circuit, have rejected the central premise of Fastow's argument – that he should not be forced to choose between responding to discovery requests (and potentially providing fodder for criminal investigations), or invoking the Fifth Amendment and facing an adverse inference in the *Tittle* case.

To the contrary, the law is clear that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palatino*, 425 U.S. 308, 318 (1976). Hence, the Fifth Circuit has held that it is reversible error for a trial court to exclude evidence of a civil defendant's invocation of his Fifth Amendment privilege. *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 675 (5th Cir. 1999). Accordingly, Fastow's well-founded fear that a negative inference will be drawn against him in the *Tittle* litigation (*see, e.g.*, Fastow Mem. at 2, 5) is of no Constitutional moment.

In any event, Fastow has ***already*** refused to answer questions on Fifth Amendment grounds before Congress – and Plaintiffs are thus ***already*** entitled to an adverse inference charge under the Fifth Circuit's decision in *Curtis*, 174 F.3d at 675.

Hence, Fastow's main justification for the relief he seeks is no justification at all.

B. Neither The Fifth Amendment Nor the Criminal Rules of Procedure Bar the *Tittle* Plaintiffs' Document Requests

Although Fastow dances around the issue, the discovery promulgated to date by the *Tittle* Plaintiffs consist of requests for the production of documents ("RFP's"). As the Supreme Court has made abundantly clear, there is no automatic Fifth Amendment protection from producing documents, since it is "the settled proposition that a person may be required to produce specific documents even thought they contain incriminating assertions of fact or belief because the

creation of those documents was not 'compelled' within the meaning of the privilege." *United States v. Hubbell*, 530 U.S. 27, 35-36 (2000). Thus, there is no *per se* constitutional authority for refusing to turn over documents merely because they may be incriminating in possible criminal proceedings.[2]

Nor should this Court credit Fastow's assertion that a total stay is necessary because "[t]he broad scope of civil discovery, as compared to the narrow scope of criminal discovery, may present the prosecution with 'an irresistible temptation to use that discovery to one's advantage in the criminal case.'" Fastow Mem. at 9 (quoting *Afro-Leon, Inc. v. United States,* 820 F.2d 1198, 1207 (Fed. Cir. 1987)). To the contrary, the law is clear that "[T]he strict limitations on discovery in criminal cases, embodied in Federal Rules of Criminal Procedure 15-17, do not take effect until after a grand jury has returned an indictment." *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1381 (D.C. Cir. 1980). Indeed, until such time, ***the grand jury's subpoena powers are quite broad.*** *See id.* at n.3 (noting that "the common practice is for grand jury subpoenas to be issued in blank, with the contents to be filled in by the prosecutor"). Hence, there is no danger at present that discovery in the *Tittle* case will prejudice Fastow in any future criminal case.

C. Any Balancing Test Results In the Denial of Fastow's Motion

The Constitution "does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." *Dresser Industries*, 628 F.2d at 1375. As Fastow correctly notes, however, this Court and other courts have applied a balancing test when faced with requests to stay civil discovery with respect to a litigant who faces criminal charges arising from the same conduct as the civil litigation. *See Kmart Corp. v. Aroids*, Civ. No. H-96-1212 (S.D.

[2] Fastow has not argued that there is testimonial information conveyed in the act of responding to the *Tittle* Plaintiffs' RFPs that might be subject to Fifth Amendment protection. If he had done so (or if he does so with respect to future RFPs in this litigation), that question should be addressed as a question of fact by this Court. *Compare Fisher v. United States,* 425 U.S. 391, 396 (1976) (no testimonial evidence in producing tax records) with *United States v. Doe*, 465 U.S. 605, 613-14 (1984) (Court would not disturb trial court's finding that there was testimonial evidence in producing subpoenaed documents at issue). In any event, the Court can resolve any such issues when and if they arise.

Tex. Dec. 11, 1996) (Ex. 1 to Fastow Mem. (citing *United States v. Cordell*, 397 U.S. 1, 12 n.27 (1970)). Indeed:

> The Court is required to weigh the interests of the civil plaintiffs in going forward with discovery with the defendants' risk of self-incrimination and the Court's needs to use scarce judicial resources as efficiently as possible.

Kmart, Order at 5 (citing *Welling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1980); *Brumfield v. Shelton*, 727 F. Supp. 282, 285 (END. La. 1989); *United States v. Cordell*, 397 U.S. 1, 12 n.27 (1970) (a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions "when the interests of justice seem to require such action, sometimes at the request of the prosecution, . . . sometimes at the request of the defense").

As this Court noted, the strongest case for a stay is where the party is already under indictment, and the issues in the civil proceeding are "the same" as in the pending criminal proceeding. *Kmart,* Order at 5. *See, e.g., Citibank, N.A. v. Hakim*, 1993 U.S. Dist. Lexis 16299 at *3 (S.D.N.Y. 1993) ("Although defendant Hakim allegedly is a target of a continuing grand jury investigation, he does not claim to have been indicted. ***Accordingly, Hakim's pre-indictment motion to stay can be denied on this ground alone.***"); *see also SEC v. Musella,* Fed. Sec. L. Rep. (CCH) 99156, 38 Fed. R. Serv. 2d (Callaghan) 426 (S.D.N.Y. 1983) (defendant's pre-indictment motion to stay civil case denied).

Here, while the *Tittle* Plaintiffs do not dispute that Fastow may face criminal liability for some of the same conduct as that at issue in their case, he has not yet been indicted. That is an important difference, since the criminal proceedings against Fastow and many others could go on for a very long time indeed. In contrast, in *Kmart* and other cases where proceedings are already underway, there is a much greater likelihood that criminal proceedings will draw to a close fairly quickly.[3]

[3] By the same token, there is no real concern that additional discovery will be gathered here and used in the criminal proceedings, since, at this pre-indictment stage, the Grand Jury investigating Fastow and his Enron cronies

Moreover, in this case (unlike in ***any*** of Fastow's cases), Fastow has ***already*** invoked the Fifth Amendment. Thus, it is hard to imagine any real prejudice to Fastow's position in ***either*** the civil cases ***or*** in the pending criminal investigation by requiring him to respond to discovery here. Recognizing the weakness of his position in this regard, Fastow meekly asserts that "even if [he] were to exercise his Fifth Amendment Privilege in response to civil discovery, his invocation of that privilege on a question-by-question basis will provide clues for the government to use in its investigation and prosecution of him." Fastow Mem. at 5. Not surprisingly, Fastow can find no authority for this assertion. Indeed, it simply defies credibility to suppose that prosecutorial spies can somehow gain "clues" from, *e.g.*, reading responses to RFPs that refuse to produce documents based on the Fifth Amendment. If that were the case, the cat would already be out of the bag, as the offending, illuminating and "clue-providing" RFPs have already been served on a variety of defendants.

Perhaps of equal importance, many defendants have already asserted the Fifth Amendment in connection with the Enron debacle – either at Congressional hearings (in the case of defendants Fastow, Causey, Buy, Lay, Duncan, and Bauer) or in depositions (in the case of Temple and Duncan). ***Yet none of those defendants have sought the same relief as Fastow – and some of the defendants have already been deposed.*** Not only would it be inequitable to those defendants to grant Fastow the relief he seeks, but it would also invite a slew of copycat motions. Simply put, granting Fastow's motion could, in short order, lead to a complete suspension of these consolidated proceedings. Such a result would be unfortunate for the Plaintiffs, class members, and other defendants who have all pledged to work hard to expeditiously resolve these cases. It would also undo the schedule the Court has put in place, and indeed eviscerate many of the economies that will otherwise be achieved by this Court's consolidation of the civil cases arising from the Enron debacle.

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has broad subpoena powers and can likely obtain the same documents as the *Tittle* Plaintiffs here. *Dresser Industries*, 628 F.2d at 1368 n.3.

Finally, although Fastow's cases speak of the need to examine "the private and public interests" involved in granting the relief he seeks, *see, e.g., Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134 (S.D.N.Y. 1995), Fastow's papers are silent on this key point. This silence is telling, as neither of these interests weighs in his favor.

First, the balance of the parties' interests weighs against the stay. The legitimate benefits to Fastow of the stay are *de minimis,* since he has already invoked the Fifth Amendment and remains subject to the broad subpoena powers of the Grand Jury investigating Enron. In contrast, the interest of the Plaintiffs is great in obtaining the expeditious resolution of their claims.

Second, judicial efficiency counsels strongly in favor of denying Fastow's request. No matter what happens with Fastow (or any of the other targets or potential targets of the Grand Jury), Plaintiffs' case will proceed against these and other defendants who are as yet not targets of any Grand Jury. In these circumstances, efficiency will not be served by this Court's waiting for the "final" results of the many investigations surrounding Enron's collapse. *See, e.g., United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 802 (E.D.N.Y. 1992).

Finally, the delay proposed by Fastow can only do harm to the public interest in obtaining prompt and effective redress from Fastow and the other defendants at the heart of the greatest public business scandal of our era. *Cf. Federal Deposit Ins. Corp. v. Renda*, 1987 U.S. Dist. Lexis 8305 (D. Kan. 1987) (quoting *Securities and Exchange Commission v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 666-67 (5th Cir. 1981) ("The Supreme Court has refused to create a per se rule prohibiting the simultaneous prosecution of civil and criminal actions because 'prompt investigation and enforcement both civilly and criminally [are] sometimes necessary in order to protect the public interest.'")). This is certainly such a case, as the public faith in our legal and financial systems will be aided by the prompt resolution of the criminal and civil liability of Fastow and all of the other defendants.

III.

CONCLUSION

In the guise of a motion to "stay" discovery against Fastow, Fastow seeks to derail Plaintiffs' entire case. Because Fastow has provided no cogent basis for the extraordinary relief he seeks, the *Tittle* Plaintiffs respectfully request that this Court deny his motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion was served on all counsel by e-mail, certified mail, return receipt requested, and/or facsimile, this 6th day of May, 2002.

Robin L. Harrison